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No. 95-

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1995

MATTHEW B. GOODALL, An Infant By His Father and Next Friend, Robert B.Goodall and Robert B. Goodall and Kathleen N. Goodall,

Petitioners,

v.

STAFFORD COUNTY SCHOOL BOARD,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. If a deaf child attends a private religious school due to the family's sincerely held religious beliefs and the parents' rights to direct the education and religious upbringing of the child, does a local school board, which provides special education services under IDEA, and which routinely provides special education services to public school children at locations other than its public schools, burden or violate those rights by refusing to provide him a deaf interpreter at any location other than a public school?

II. Whether the school board's conduct violates the neutrality principle of the clauses of the First Amendment?

III. Whether an indirect or economic burden on the free exercise of religious beliefs, as in the case of Sherbert v. Verner and in the present case, constitutes a "substantial burden" requiring a compelling governmental interest exercised by the least restrictive means under the Religious Freedom Restoration Act of 1993?

PARTIES TO THE PROCEEDING:

Matthew B. Goodall, an infant, by his father and next friend, Robert B. Goodall, Robert B. Goodall and Kathleen N. Goodall,

Appellants

Stafford County School Board,

Appellee

Virginia School Boards Association,

Amicus Curiae

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STATEMENT OF THE GROUNDS OF JURISDICTION

Date of entry of the judgment sought to be reviewed. July 27, 1995

Statutory jurisdiction of this court: 28 USC § 1254

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED IN THE CASE

United States Constitution, Amendment I (App 17)

Federal Statutes

20 USC §§ 1400 et seq, Individuals with Disabilities Education Act (App 17)

42 USC §§ 2000 bb et seq, Religious Freedom Restoration Act of 1993 (App 18)

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The pertinent text of each provision is contained in the Appendix to this petition.

STATEMENT OF THE CASE INCLUDING MATERIAL FACTS

The Plaintiffs, Matthew Goodall and his parents Robert B. Goodall and Kathleen N. Goodall ("the Goodalls") are residents of Stafford County, Virginia.

The Defendant, Stafford County School Board is charged with implementing in Stafford County, Virginia the Individuals with Disabilities Education Act, 20 USC § 1401, et seq. (hereinafter "IDEA") by providing special education services to both public and private school handicapped children who live in Stafford County.

Matthew Goodall is profoundly deaf as a result of an attack of meningitis at age 3 1/2. He uses cued speech[1] for receptive language. He has been identified by the school board as a handicapped child for whom special education services are appropriate. To be successfully mainstreamed in school Matthew requires the special education service of a

[1]In cued speech the speaker continues to use his normal language (in this case, English). The shape and position of the speaker's hand near his mouth, together with the shape of his lips, make every sound visually distinct. It takes all guesswork out of lip reading, so the speaker's words in his normal language (English) are fully understandable to the deaf "listener".

full-time, cued speech interpreter in his regular classroom. The school board agrees that this is an appropriate special education service for Matthew under IDEA.

Matthew was placed by his parents in private, Christian schools in the mid-1980's. The Goodalls hold a sincere, religious conviction that they are to provide their children with Christian education and that they are to do so at this time in Christian schools.

Cued speech interpretation for Matthew under the IDEA is an important governmental benefit. He needs it to benefit from education; he needs it full-time i.e., for the whole of each school day and for any extracurricular activity (App 3 note 2, 14 #8, 33); his need is ongoing for every school year; and it is expensive.

Under IDEA the school board provides one-on-one, full-time, cued speech interpreters for all deaf children whose parents have chosen cued speech as the child's primary mode for receptive language and who are enrolled in the Stafford County public schools.

The school board provides special education services under IDEA to children who are enrolled in the public school system, not only on the premises of its public schools, but also in homes, in the public schools of other counties, and, both inside and outside of Stafford County, in private day schools, private residential facilities, and public institutions. (App 29 - 31)

When Matthew was in enrolled in the Stafford public school system in kindergarten, the school board provided Matthew special education services including a cued speech interpreter, not at a Stafford public school, but at an elementary school in an adjoining county, at a location farther

from Stafford County than Fredericksburg Christian School (hereinafter "FCS").

Nevertheless, at its IEP meetings with the Goodalls after Matthew began to attend FCS, the school board refused to provide Matthew an interpreter at any location other than a Stafford County public school. It did so pursuant to a school board policy that it provides services to private school students only on the premises of its public schools. (App 15 #12, 28, 29)

The school board's refusal to provide Matthew a cued speech transliterator on the premises of his religious school conditioned the Goodalls' receipt of that important governmental benefit upon their violating sincerely held religious beliefs. In contrast, the school board's refusal to provide at FCS other appropriate services (like speech therapy) which do not have to be given at Matthew's regular school to be effective, does not have the same coercive effect. (App 18, 19)

As a result, the Goodalls have borne the personal burden and financial expense for providing cued speech interpreting services for Matthew. Plaintiff Kathleen Goodall personally provided this service for Matthew during his 6th, 7th and 8th grade years. Then the Goodalls began paying others to provide this service, at first on a part-time basis, and later on a full-time basis. (App 3) The cost to the Goodalls of providing a cued speech interpreter to Matthew from January 1992 through June 1995 when Matthew graduated was $39,759.92. (App 3, note 2).

In prior litigation between these parties the Fourth Circuit ruled in Goodall by Goodall v. Stafford County School Board, 930 F 2d 363 (4th Cir 1991) (hereinafter called "Goodall I") that the school board was not required by

the IDEA to provide Matthew Goodall a cued speech interpreter at FCS; and that any burden on the Goodalls' free exercise rights was permitted, because the school board would violate the Establishment Clause if it provided Matthew Goodall an interpreter on the premises of his religious school; and avoiding such a violation was a compelling governmental interest.

This Court denied the Goodalls' petition for certiorari 502 US 864, 116, L Ed 2d 149, 112 S Ct 188 (1991); but this Court subsequently ruled in Zobrest v. Catalina Foothills School District, 509, US _____, 125 L Ed 2d 1, 113 S Ct .2462 (1993) that a school board does not violate the Establishment Clause by providing an interpreter for a deaf child on the premises of a religious school under IDEA.

Subsequently, the Goodalls and the school board met again to draft an individualized education program ("IEP") for Matthew. The Goodalls requested that the school board provide Matthew an interpreter at FCS The school board insisted that the location of service be a Stafford public school. The Goodalls brought suit in the United States District Court for the Eastern District of Virginia alleging that the school board's conduct:

A. burdened the free exercise of the Goodalls' sincerely held religious beliefs without a compelling governmental interest to do so in violation of the Free Exercise Clause.

B. violated the Goodalls' rights as parents to direct the education and religious upbringing of their son.

C. violated the Establishment Clause by exhibiting government hostility, not neutrality, toward religious adherents.

During the pendency of the suit Congress passed the Religious Freedom Restoration Act of 1993, 42 USC §§ 2000 bb et seq (hereinafter "RFRA"). The Goodalls amended their complaint to allege the infringement of the free exercise of their religious beliefs as protected by RFRA.

At trial the school board conceded that Matthew needs a full-time interpreter for the deaf in order to benefit from education, that he attends Fredericksburg Christian School due to the Goodalls' sincerely held religious beliefs, and that the Goodalls have paid the amounts they alleged, approximately $14,000 per school year, for that service. (App 3, note 6, 32, 33). The Goodalls testified that an interpreter for the deaf is an important governmental benefit, because Matthew needs an interpreter all-day, every school day, every school year to get any benefit from education (App 33); and that the school board's refusal to provide this service at any location other than a Stafford public school forces them to choose between receiving that important service and violating their sincerely held religious beliefs. (App 33, 34).

The district court granted the school board's motion for judgment as a matter law stating that this failed to show a burden on the free exercise of religious beliefs.

On appeal the Fourth Circuit affirmed, ruling:

a) the school board's conduct did not directly prohibit Matthew from attending FCS; and the indirect compulsion to violate sincerely held religious beliefs in order to receive an important governmental benefit does not violate the Free Exercise Clause.

b) the Goodalls' economic and personal burdens were not "substantial burdens" on the exercise of religious beliefs for which RFRA requires a government to

demonstrate a compelling governmental interest exercised by the least restrictive means.

c) the school board's conduct did not violate the Establishment Clause.

The circuit court did not address the Goodalls' rights as parents to direct the religious upbringing and education of their son.

BASIS OF FEDERAL JURISDICTION

20 USC § 1415 (E) (2) Judicial Review and resolution of IDEA dispute.

42 USC § 1983 Protecting citizens against state action depriving them of rights secured by the Constitution and Federal statutes.

ARGUMENT

I. If a deaf child attends a private religious school due to the family's sincerely held religious beliefs and the parents' rights to direct the education and religious upbringing of the child, does a local school board, which provides special education services under IDEA, and which routinely provides these services to public school children at locations other than its public schools, burden or violate the family's rights by refusing to provide the child a deaf interpreter at any location other than a public school?

It is important for the Supreme Court to grant certiorari in this case, because the Court of Appeals has

decided a federal question in a way that conflicts with applicable decisions of this Court. Rule 10, Rules of the United States Supreme Court.

A. The Court of Appeals' decision conflicts with the holdings of the Supreme Court in Sherbert v. Verner, 374 US 398 (1963), Thomas v. Review Board of Indiana Employment Security Division, 450 US 707 (1981), Hobbie v. Unemployment Appeals Commission, 480 US 136 (1987), and Frazee v. Illinois Dept. of Employment Security, 489 US 829 (1989)[2], that when a government conditions a citizen's receipt of an important governmental benefit upon the citizen's violating sincerely held religious beliefs, then it has substantially burdened those beliefs.

The analysis of these cases is simple:

1. Is the benefit in question an important governmental benefit?

2. Has the school board conditioned the Goodalls' receipt of it upon their violating sincerely held religious beliefs?

3. If so, does the school board have a compelling reason which it is pursuing by the least restrictive means?

The Fourth Circuit quoted the Supreme Court's holding in those cases that indirect, economic burdens on free exercise rights can be substantial:

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[2]and similar cases outside the unemployment compensation area. See Perry v. Sindermann, 408 US 593, 597, 33 L Ed 2d 570, 577, 92 S Ct 1790 (1963).

> Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial. *Hobbie*, 480 U.S. at 141 (quoting *Thomas*, 450 U.S. at 717-18) Goodall II, 60 F 3d at 172. (emphasis added)

If the Fourth Circuit had followed the analysis of Sherbert, Thomas, Hobbie and Frazee, then the Goodalls would have prevailed. Special education services for handicapped children are an important governmental benefit; and the school board conditioned the Goodalls' receipt of this benefit upon their violating sincerely held religious beliefs. An interpreter simply has to be at the same location as the person for whom he is interpreting.

Although the Fourth Circuit quoted this analysis from Hobbie and Thomas, it immediately abandoned this analysis and ruled that the free exercise of the Goodalls' religious beliefs was not burdened because there was no direct compulsion:

> However, the Goodalls have neither been compelled to engage in conduct proscribed by their religious beliefs, nor have they been forced to abstain from any action which their religion mandates that they take. . . . We find that the financial burden which the Goodalls must bear in order to provide Matthew with a cued speech interpreter at his private sectarian

school does not constitute a substantial burden . . . Goodall II, 60 F 3d at 172, 173.

When and how a government must accommodate the free exercise of its citizens' religious beliefs are important and recurring questions. The analysis of Sherbert, Thomas, Hobbie and Frazee has guided the answer to those questions for many years. The Fourth Circuit erred in holding that cases of indirect compulsion and significant economic pressure to violate religious beliefs do not merit free exercise protection.

To put it bluntly, either Sherbert, Thomas, Hobbie and Frazee remain viable as constitutional jurisprudence, or they do not. If they remain valid, then the Goodalls' case is plainly governed by their rule. If they do not remain valid, that pronouncement should come in a clear ruling from the Supreme Court; not a circuit court opinion which doesn't hold that they are no longer good law, but which refuses to apply their rule in a case to which they are plainly applicable if they remain valid law.

B. The Court of Appeals' decision conflicts with the holding of this Court in Bowen v. Roy, 476 US 693 (1986). Bowen distinguished the Social Security Act, which requires all applicants for benefits to have social security numbers without exception and permits no individualized hearings on this issue, from the statutes in Sherbert, Thomas, Hobbie and Frazee. In Bowen the Supreme Court held that if a law has a general application which would deny a benefit, but the law acknowledges exemptions from its application (in which cases it confers the benefit), then the refusal to extend the benefit to a citizen who demonstrates in an individualized hearing that his conduct is motivated by sincerely held religious beliefs suggests a discriminatory intent; exhibits hostility, not

neutrality, toward religion; and violates the free exercise clause.

The Goodalls' case is even stronger than the unemployment compensation cases cited in Bowen, because the statute in question, IDEA, does not generally deny special education services to private school children. Congress specifically included handicapped children placed by their parents in private schools among the people to be benefited by IDEA. 20 USC § 1413(a)(4)(A); and it provided for special education services to be given at locations other than public school premises. 34 CFR §76.659. This Court has construed IDEA to benefit children attending parochial schools and to permit deaf interpreters to render services on the premises of those schools. Zobrest v. Catalina Foothills School District, 509 US _____, 125 L Ed 2d 1, 113 S Ct 2462 (1993). In other words, the provision of special education services at many locations to public and private school children is the rule, not an exception, under IDEA. It is the conduct of the school board as an administrator applying the statute that denies the benefit. As the Fourth Circuit stated in Goodall I:

> It is not the state or federal education statutes the Goodalls challenge constitutionally, but rather, the actions of the County. Goodall I, 930 F 2d at 369.

Nor does the Stafford school board have a rule that it will provide services only at its public schools. While the school board provides many special education services on the premises of its public schools, for children enrolled in the public schools it also provides those services in homes, at public schools of other counties, and, both inside and outside of Stafford County, at private day schools, private residential care facilities and public institutions. (App 29-31) Indeed,

when Matthew was in enrolled in the Stafford public school system in kindergarten he received special education services including a cued speech interpreter, not in a Stafford public school, but at an elementary school in an adjoining county, at a location farther from Stafford County than FCS.

Therefore the "rule" is that services are provided in many locations, including private schools, as contemplated by IDEA. The only "exception" is that private school children are singled out to be denied benefits under the guise of a "policy" that they must be served only on the premises of public schools; even if the result of this restriction (which is not required by IDEA or its regulations) is to deny the benefit altogether.

Bowen also found it significant that the good cause exceptions to the general rule that would have denied benefits in the unemployment compensation cases were determined in individualized hearings. In this respect the IDEA is like the unemployment compensation statutes: the location of each service for each child is determined in an individual IEP meeting. See 34 CFR §300.552 Placements (App 28); and there is a specific due process right to an administrative hearing followed by court review on that issue. 20 USC §1415(E)(2).

In summary, if the general application of a statute would deny a benefit, but the free exercise clause may require the government to create an exemption and confer the benefit; then the free exercise clause is even more clearly violated when the general application of the statute permits the benefit, but the local administrator chooses to withhold that benefit from otherwise qualified citizens exercising sincerely held religious beliefs.

C. The Circuit Court's decision conflicts with the Supreme Court's decision in Employment Division v. Smith, 494 US 872, 108 L Ed 2d 876, 110 S Ct 1595 (1990). In Employment Division v. Smith the Supreme Court held that the burden on free exercise of religious beliefs becomes legally cognizable when it is coupled with infringement of other constitutionally protected rights such as the rights of parents to direct the education and religious up-bringing of their children.

> The . . . decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the free exercise clause alone, but the free exercise clause in conjunction with other constitutional protections, such as . . . the right of parents, acknowledged in Pierce v. Society of Sisters, 268 US 510, 69 L Ed 1070, 45 S Ct 571 (1925) to direct the education of their children, see Wisconsin v. Yoder, 406 US 205, 32 L Ed 2d 15, 92 S Ct 1526 (1972)[1] . . .
>
> [Footnote] [1]Yoder said that "the Court's holding in Pierce stands as a charter of the rights of parents to direct the religious up-bringing of their children. And, when the interests of parenthood are combined with a free exercise claim of the nature revealed by this record, more than merely a "reasonable relation to some purpose within the competency of the state" is required to sustain the validity of the state's requirement under the First Amendment." 406 US, at 233, 32 L Ed 2d 15, 92 S Ct 1526. Employment

Division v. Smith, 494 US 872 at 881, 108 L Ed 2d 876 at 887, 110 S Ct 1595 (1990)

The true distinguishability of such "hybrid" claims has been questioned. Church of Lukumi v. Hialeah, 508 US _____, 124 L Ed 2d 472 at 512, 113 S Ct 2217 (1993; Souter, J. concurring). If the "hybrid claim" distinction is valid law, then the Goodalls' claims certainly fall within it. They present not only a free exercise claim, but also the right of parents to direct the education and religious up-bringing of their child.

D. The Fourth Circuit's reliance on Employment Division v. Smith 494 US 872, 108 L Ed 2d 876, 110 S Ct 1595 (1990) to deny the Goodalls' claim is misplaced. In Employment Division v. Smith This Court considered whether a state may make a religiously neutral law making all use of peyote a crime without entertaining exceptions for religiously motivated conduct.[3]

The Goodalls' case is unlike Employment Division v. Smith, because:

1. the statute in question, IDEA, does not restrict special education services to public school children without exception; nor does it require all special education services to be rendered on public school premises without exception. The statute permits parents to choose public or private schools and still receive special education services. Zobrest v. Catalina Foothills School District, 509 US _____, 125 L Ed 2d 1, 113 S Ct 2462 (1993). The IDEA statute in

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[3]The five member majority concluded that Oregon could make such a law without a compelling governmental interest. Justice O'Connor concluded that Oregon had a compelling governmental interest; and the three dissenting members found no compelling interest and concluded the law violated free exercise rights.

Zobrest and in the Goodalls' case is like that in Witters v. Washington Department of Services for the Blind, 474 US 481 (1986): the statute permits an aid recipient to make the individual private choice to use this governmental benefit in a religious setting. Obviously, this contrasts with the Oregon criminal statute which permits no individual private choice concerning the use of peyote.

2. Given the procedural posture of the Goodalls' case[4] the school board has not advanced any reason for its discriminatory conduct, much less a compelling reason.

E. The Fourth Circuit's reliance on Regan v. Taxation with Representation of Wash., 461 US 540(1983), Rust v. Sullivan, 500 US 173 (1991) and McCarthy v. Hornbeck, 590 F. Supp. 936 (D.Md. 1984) , is also misplaced. Those cases held that a constitutional right is not infringed simply because a legislature chooses not to fund it. Those cases are inopposite, because in IDEA Congress did choose to fund special education services for both public school children and private school children. Congress is the legislature; the school board is an administrator. Congress' religiously neutral legislation, IDEA, does not exclude services to private school children in general nor an interpreter for the deaf on the premises of a religious school in particular. Zobrest v. Catalina Foothills School District, 509 US _____ , 125 L Ed, 113 S Ct 2462 (1993). Rather, it is the school board's conduct in administering IDEA which chooses to exclude from its benefit an otherwise qualified individual who is practicing sincerely held religious beliefs. That is simply religious discrimination.

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[4]The District Court entered a judgment as a matter of law at the end of the plaintiff's evidence.

II. Whether the school board's conduct violates the neutrality principle of the clauses of the First Amendment?

The establishment clause, together with the free exercise clause[5] requires the government to be neutral in its treatment of religious adherents. The school board provides special education services to handicapped children enrolled in the public schools, not only at public schools but also at private schools, in homes, in hospitals or at any other appropriate location determined after individualized inquiry. (App 29 - 31). However, it refuses to extend any necessary service on the premises of a private school to a child placed there pursuant to sincere religious beliefs[6]. This exhibits hostility, not neutrality, toward religion and violates the neutrality principal the Supreme Court has repeatedly found inherent in the establishment clause:

> . . . the First Amendment requires the state to be neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them. Everson v. Board of Education, 330 US 1, 17, 91 L Ed 2d 711, 724 (1946)

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[5]or free speech clause in an appropriate case such as Rosenberger v. Univ. of Virginia, _____ US _____, 132 L Ed 2d 700, _____ S Ct _____ (1995)

[6]Despite the requirements that services be provided to them in IDEA 20 USC §1413(A)(4)A, its regulations 34 CFR §30.450 et seq. and the Education Division General Administrative Regulations ("EDGAR") 34 CFR §76.651-663.

> . . . the extension of unemployment benefits to Sabbatarians in common with Sunday worshippers reflects nothing more than the governmental obligation of neutrality in the face of religious differences . . . This holding but reaffirms a principle . . . that no state may exclude . . . members of any . . . faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation. Sherbert v. Verner, 374 US 398, 10 L Ed 2d 965, 83 S Ct 1790 (1963)
>
> The attitude of government toward religion must, as this court has frequently observed, be one of neutrality . . . it requires that "government neither engage in nor compel religious practices, that it effect no favoritism among sects or between religion and non-religion, and that it work deterrence of no religious belief. Board of Education v. Allen, 392 US 236, 249, 20 L Ed 2d 1060, 1069, 88 S Ct 1923 (1968)
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> [When the government] conveys a message of government endorsement or disapproval of a religion, a the core purpose of the establishment clause is violated. Grand Rapids School District v. Ball, 473 US 373, 389, 87, L Ed 2d 267, 105 S Ct 3216 (1975)

Most recently, in Rosenberger v. Univ. of Va, _____ US _____, 132 L Ed 2d 700 _____, S Ct _____ (1995) the Supreme Court stated:

> We have held that the guarantee of neutrality [toward religion] is respected, not offended,

> when the government, following neutral criteria and even-handed policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse. Rosenberger, supra _____ US at _____, 132 L Ed 2d at 722

and held:

> the neutrality commanded of the State by the separate Clauses of the First Amendment was compromised by the University's course of action. . . . That course of action was a denial of the right of free speech and would risk fostering a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires Rosenberger, supra _____ U S at _____, 132 L Ed 2d at 726 (emphasis added).

As Justice O'Conner stated in her concurring opinion:

> We have time and again held that the government generally may not treat people differently based on the God or gods they worship, or don't worship. . . . This insistence on government neutrality toward religion explains why we have held that schools may not discriminate against religious groups by denying them equal access to the facilities that the schools make available to all. . . . Withholding access would leave an impermissible perception that religious activities are disfavored. Rosenberger, supra _____ US at _____, 132 L Ed 2d at 726.

And as Justice Thomas stated:

> Our nation has a long tradition of allowing religious adherents to participate on equal terms in neutral government programs. This tradition is vindicated by the establishment clause. Rosenberger, supra _____ US at _____ 132 L Ed 2d at 731 (Thomas, J. concurring)

Two analogies between Rosenberger and the Goodalls' case are obvious. First, in IDEA Congress provided equal access to education for all handicapped children by providing for them the special education services they need to benefit from education. When the school board as an administrator denies that equal access to otherwise qualified citizens who are practicing religious beliefs, it exhibits hostility, not neutrality, toward religion.

Second, the school board is violating the viewpoint neutrality that Rosenberger held is required by the clauses of the First Amendment. The difference between education at FCS and at the Stafford public schools is that the former intentionally and pervasively presents a Christian viewpoint. The Goodalls' choice of this viewpoint for their son's education is protected by the free exercise clause and the constitutional rights of parents found in Pierce. However, for a deaf child, no viewpoint can be communicated unless the child has an interpreter. The Stafford County School Board's selective refusal to fund an interpreter for Matthew because of the religious viewpoint his parents have chosen for his education burdens these rights in the same way that the University of Virginia's refusal to fund publication of Wide Awake because of its religious viewpoint burdened its publishers' rights.

The school board blatantly stated in Goodall I that it was refusing to provide Matthew an interpreter at FCS because of its pervasive religious viewpoint in education. It argued that it would violate the Establishment Clause if it did so. (See *Questions Presented* in Stafford's 1991 brief in opposition, App 34). Zobrest held that such funding would not violate the Establishment Clause. Rosenberger went further and held that failure to fund an otherwise qualified applicant because of religious viewpoint violates the neutrality commanded by the separate clauses of the First Amendment.

Although the Fourth Circuit waited for the Supreme Court's ruling in Rosenberger before deciding Goodall II, the Fourth Circuit then ignored its holding. **The appropriate response would be to grant certiorari, vacate the circuit court's opinion, and remand for further consideration in light of the Supreme Court's holding in Rosenberger;** and the Goodalls request that This Court do so if it chooses not to grant certiorari to review the other suggested errors.

III. Whether an indirect or economic burden on the free exercise of religious beliefs, as in the case of Sherbert v. Verner or in the Goodalls' case, constitutes a "substantial burden" requiring a compelling governmental interest exercised by the least restrictive means under the Religious Freedom Restoration Act of 1993?

It is important for the Supreme Court to grant certiorari in this case, because the court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court. Rule 10, Rules of the United States Supreme Court.

In Goodall II the Fourth Circuit made a wild misinterpretation of RFRA.

First, it ignored the language of the statute and reached the incredible conclusion that cases of indirect compulsion or economic pressure to violate religious beliefs like Sherbert v. Verner do not violate of the statute, even though Congress specifically cited Sherbert v. Verner as an example of government conduct that would violate the statute! The section by section analysis to the act states in part:

> Sec. 7. This section makes it clear that the legislation does not alter the law for determining claims made under the Establishment Clause of the First Amendment. It also confirms that granting government funding, benefits or exemptions, to the extent permissible under the Establishment Clause, does not violate the Act; *but the denial of such funding, benefits or exemptions may constitute a violation of the Act, as was the case under the Free Exercise Clause in Sherbert v. Verner*. S 2824 Congressional Record - Senate, March 11, 1993, (emphasis added)[7].

Congress expressly stated that the denial of funding, benefits or exemptions may constitute a violation of the act and cited Sherbert v. Verner as a specific example of a case that would be a violation. Therefore, the Fourth Circuit erred

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[7]The parallel between the emphasized language and Rosenberger is obvious: The denial of government funding, benefits or exemptions, to the extent permitted under the Establishment Clause, may violate the neutrality commanded by the separate clauses of the First Amendment, as was the case in Rosenberger v. Univ. of Va.

in concluding that cases of economic or indirect burden (which is precisely the burden in Sherbert v. Verner and in the Goodalls' case) are not violations of the Act.

Second, the Fourth Circuit badly errs in its determination of the meaning of "substantial burden" under RFRA. **This is an important question of federal law which has not been, but should be settled by this Court.**

The Fourth Circuit looked to prior case law to determine the meaning of "substantial burden" under RFRA, but it took no guidance from Congress in RFRA itself in determining what constitutes a "substantial burden". That is plain error.

- Congress stated:

> The purposes of this Act are . . . to restore the compelling interest test as set forth in Sherbert v. Verner, 374 US 398 (1963) and Wisconsin v. Yoder, 406 US 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened . . .42 USC §2000bb(2)(b)(1).

By expressly adopting the standard of Sherbert v. Verner and Wisconsin v. Yoder, Congress made it clear that RFRA governs both:

a) laws that directly require a citizen to do something prohibited by his religious beliefs or to refrain from doing something required by his religious beliefs, as was the case in Wisconsin v. Yoder; and

b) an application of a statute that conditions a citizen's receipt of an important governmental benefit upon the citizen's doing or refraining from doing

something that would violate his sincerely held religious beliefs, as was the case in Sherbert v. Verner.

When the Fourth Circuit looked to prior case law to determine the meaning of "substantial burden", it plainly erred in departing from these clear statements from Congress as to which prior cases determine that meaning.

Instead, in its highly selective review of prior cases, the Fourth Circuit looked to Braunfeld v. Brown, 366 US 599, (1961). Congress did not cite Braunfeld as setting forth the standard which it was restoring in RFRA, and Braunfeld is factually dissimilar. It does not involve religious neutrality in government funding, nor is it an instance of the state conditioning a citizen's receipt of a governmental benefit on violating sincerely held religious beliefs. The Fourth Circuit also looked to Regan v. Taxation With Representation, 461 US 540 (1983) and similar cases. Congress did not cite these cases as setting forth the standard it was restoring in RFRA, and those cases are also dissimilar. In each of them a legislature fashioned a limited benefit for some of its citizens. As argued above at pages 10-12, Congress' legislation in IDEA did not exclude Matthew Goodall from its benefit. Only the school board's religious discrimination in administering the benefits of IDEA excluded him.

The Fourth Circuit cited Sherbert, Thomas, Hobbie and Frazee in its list of prior cases which reveal the meaning of "substantial burden" and even quoted the specific language in Hobbie and Thomas:

> Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial

> pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial. Goodall II, 60 F 3d at 172 (emphasis added)

In this brief quote the Supreme Court twice used the word "substantial" to describe the burden on Hobbie and Thomas: an indirect compulsion and financial pressure to violate religious beliefs. How much more clearly and strongly must the Supreme Court speak for the Fourth Circuit to conclude that such cases constitute a substantial burden? If using the word "substantial" wasn't enough to signal clearly that it meant "substantial", the Supreme Court went on in Sherbert to say:

> *Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against [Sherbert] for her Saturday worship.* Sherbert v. Verner, 374 US 398 at 404 (1963) (Emphasis added).

The Goodalls respectfully submit that the Fourth Circuit's opinion in Goodall II fails immediately after its quotation of Hobbie and Thomas (App 9 and 60 F 3d at 172), because the Fourth Circuit never states whether it is concluding:

1. whether Sherbert, Thomas and Hobbie would be violations of RFRA; and

2. whether the Goodalls' case is distinguishable from them.

The Fourth Circuit does not state that the Goodalls' case is distinguishable from Sherbert, Thomas and Hobbie; and it isn't. Indeed, the pressure the school board brought on the Goodalls to violate their religious beliefs was at least as great as that in the unemployment compensation cases. In Hobbie for example, the principal pressure to violate religious beliefs was that Mr. Hobbie's private employer would fire him if he didn't work on his Sabbath. Receiving unemployment compensation was a secondary concern, but nevertheless, important. In contrast, in the Goodalls' case the principal pressure to violate their beliefs was not that they would save $2,500 per year in tuition to FCS by getting Matthew's regular education at a public school, but that the school board was blatantly conditioning their getting the special education benefit Congress intended for all handicapped children, whether at public or private schools, on their violating those beliefs; and the expense to replace that special education benefit would be $14,000 per year.

Further, unemployment compensation lasts for a brief period, amounts to a few thousand dollars; and, by definition, benefits citizens who are capable of holding jobs. In contrast, special education services for handicapped children in general, and an interpreter for a deaf child in particular, are critical if the child is to get any benefit from education. The need is on-going for years, and the amount far exceeds unemployment compensation. The children who benefit are among the citizens in our society least able to provide for themselves.

If the Goodalls' case is not distinguishable from Sherbert, Thomas and Hobbie, then we are left with the question: would Sherbert, Thomas and Hobbie be violations of RFRA? The Fourth Circuit never states its conclusion. Its answer appears to be "No". It concluded that Stafford's conduct did not constitute a substantial burden on free

exercise under RFRA, because the pressure it placed on the Goodalls to violate religious beliefs was indirect and financial - exactly the same as in Hobbie and Thomas!

By ruling that cases of indirect or economic burden do not constitute a "substantial burden" under RFRA, the Fourth Circuit:

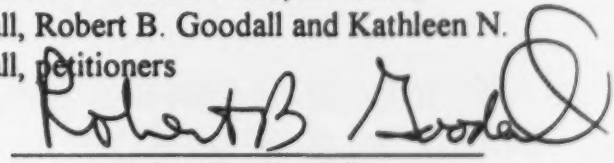
a. reversed the Supreme Court's ruling in Sherbert, Thomas, Hobbie and Frazee that such cases do constitute a substantial burden on the free exercise of religious beliefs; and

b. misinterpreted the clear statement of Congress that RFRA is to apply to such cases.

This is a grievous error which needs to be corrected. The Fourth Circuit's analysis appears to be an almost willful effort to scuttle RFRA by completely redefining "substantial burden" from the meaning plainly given by Congress in RFRA.

The Goodalls pray that their petition for writ of certiorari be granted.

Matthew B. Goodall, an infant
by his father and next friend, Robert B Goodall, Robert B. Goodall and Kathleen N. Goodall, petitioners

By: 

Robert B. Goodall

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Matthew B. GOODALL, an infant, by his father and next friend Robert B. GOODALL; Robert B. Goodall; Kathleen N. Goodall, Plaintiffs-Appellants,

v.

STAFFORD COUNTY SCHOOL BOARD, Defendant-Appellee.

Virginia School Boards Association, Amicus Curiae.

No. 94-1586.

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Argued: January 31, 1995

Decided: July 27, 1995

Before ERVIN, Chief Judge, and MURNAGHAN and MOTZ, Circuit Judges.

Affirmed by published opinion, Judge Murnaghan wrote the opinion, in which Chief Judge Ervin and Judge Motz joined.

OPINION

MURNAGHAN, Circuit Judge:

Matthew B. Goodall, an infant, and his parents, Robert B. Goodall and Kathleen N. Goodall, brought an action against the Stafford County School Board in Virginia

("the County") to compel the County to provide Matthew with a cued speech transliterator[1] in his private sectarian school. They alleged that having to pay for their own transliterator constituted a substantial burden on their free exercise of religion, which amounted to a violation of both the Free Exercise Clause of the First Amendment and the Religious Freedom Restoration Act (RFRA), 42 U.S.C. §§ 2000bb to 2000bb-4. They further claimed that the burden imposed on them was not justified by a compelling interest on the part of the County. Because we find that no substantial burden was imposed on the Goodalls' free exercise of religion, we affirm the district court's grant of judgment as a matter of law in favor of the County.

I.

Matthew Goodall was rendered profoundly hearing impaired by an attack of meningitis at the age of three-and-a-half. Up until 1984, Stafford County provided Matthew with special education services in its public schools at no cost. However, in 1984, Matthew's parents placed him in a private religious school. At the time the Goodalls filed a suit in the instant case, Matthew was enrolled in Fredericksburg Christian School, located outside of Stafford County in the city of Fredericksburg, Virginia.

Stafford County offers a free public education to Matthew at its public schools, as well as the services of an interpreter, speech and language services, and learning disability services at no charge to his parents. When the County refused to provide a cued speech transliterator to Matthew at his private religious school, the Goodalls supplied

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[1] Cued speech is a phonetic system in which hand shapes in different positions near the mouth, together with the shape of the lips, visually distinguish the sounds made by the speaker, enabling a deaf child to "hear" what the speaker is saying.

the necessary services to him in other ways. Specifically, Matthew's mother provided Matthew with cued speech services for his sixth, seventh, and eighth grade years, after which the Goodalls, at their own expense, hired someone else to provide the services. The cost of such an interpreter has varied from year to year; it amounted to approximately $14,000 during the 1993-1994 school year.[2] The Goodalls seek reimbursement of the expenses already incurred, as well as the County's acknowledgment of its obligation to provide any transliteration services that would be required by Matthew during his remaining time at Fredericksburg Christian School.

The Goodalls appeared before us once previously pressing their claims, but were unsuccessful. In 1988, the Goodalls brought an action against Stafford County, challenging the County's refusal to provide a cued speech transliterator for Matthew at Fredericksburg Christian School. Summary judgment was granted against the Goodalls at the district court level, and we affirmed on appeal. *See Goodall v. Stafford County Sch. Bd.*, 930 F.2d 363 (4th Cir.) *(Goodall I), cert. denied*, 502 U.S. 864 (1991). In *Goodall I*, we held that the county's provision of a cued speech transliterator at a private religious school would violate the Establishment Clause of the First Amendment to the United States Constitution, and that the County therefore had a compelling interest for refusing to provide or to pay for the service. *Id.* at 371. In 1993, however, the Supreme Court decided in *Zobrest v. Catalina Foothills Sch. Dist.*, 113 S. Ct. 2462 (1993), that the Establishment Clause did not bar a school district from furnishing a child with a sign

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2 There is no dispute between the parties as to the amount of money that the Goodalls have paid for transliterator services at Matthew's private school. In addition, both parties agree that Matthew needs a cued speech transliterator to benefit from his education.

language interpreter in a sectarian school under a program that provided benefits to disabled children in a religion-neutral manner. *Id.* at 2469.

After the *Zobrest* Court overruled our Establishment Clause holding in *Goodall I*, the Goodalls filed the instant suit. They now assert that the County's refusal to provide Matthew with a cued speech transliterator in his private school imposes a substantial burden on their free exercise of religion,[3] and that the County has no compelling interest for imposing such a burden. The district court below decided that no substantial burden had been imposed on the Goodalls by the County's refusals to provide Matthew with a cued speech transliterator. Finding no cognizable burden, the district court considered it unnecessary to examine the County's evidence regarding its interest, and granted judgment as a matter of law to the County at the close of the Goodalls' case, under Federal Rule of Civil Procedure 52(c). The Goodalls have appealed.

II.

The Goodalls raise both a constitutional claim under the Free Exercise Clause of the First Amendment and a statutory claim under RFRA.[4] The Free Exercise Clause of the First Amendment, which is made applicable to the states through the Fourteenth Amendment, provides that "Congress shall make no law... prohibiting the free exercise" of religion. U.S. Const. amend. I. While the Free Exercise Clause commands that the government may not pass laws that stifle

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3 In *Goodall I*, we did not decide whether a substantial burden had been imposed on the Goodalls. *See* 930 F.2d at 369-70.

4 The County asserts that the Goodalls should not be able to assert their claim under RFRA. We find, however, that the Goodalls properly pleaded a violation of RFRA in their amended complaint, and we will therefore consider their claim under the statute.

religious belief or practice, *see Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 113 S. Ct. 2217, 2222 (1993), a law that is religion-neutral and generally applicable does not violate the Free Exercise Clause even if it incidentally affects religious practice. *Employment Div., Dep't of Human Resources of Or. v. Smith*, 494 U.S. 872, 878-79 (1990); *see also Church of the Lukumi Babalu Aye*, 113 S. Ct. at 2226)"[O]ur cases establish the general proposition that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has incidental effect of burdening a particular religious practice."); *American Life League, Inc. v. Reno*, 47 F.3d 642, 654 (4th Cir. 1995) ("[A] neutral, generally applicable law does not offend the Free Exercise Clause, even if the law has an incidental effect on religious practice."), *petition for cert. filed* (May 12, 1995). In *Smith*, the Supreme Court held that a free exercise challenge to a generally applicable law that incidentally affects the practice of religion should not be analyzed under the strict approach applicable to unemployment compensation cases, exemplified in *Sherbert v. Verner*, 374 U.S. 398 (1963).[5] *See Smith*, 494 U.S. at 883-85.

Congress enacted RFRA in 1993 in response to the Supreme Court's holding in *Smith*, 494 U.S. 872. In RFRA, Congress explicitly reinstated the application of the compelling interest test set out in *Sherbert*, 374 U.S. 398, and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), to "all cases where free exercise of religion is substantially burdened...." 42 U.S.C. §2000bb(b)(1). In particular, RFRA provides that government "shall not substantially burden a person's exercise of religion even if the burden results from a rule of general

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5 *Sherbert* required the government to prove a compelling state interest in order to justify any substantial impingement on free exercise rights. *See* 374 U.S. at 403.

applicability, except as provided in subsection (b) of this section." *Id.* at § 2000bb-1(a). Subsection (b) deems permissible a substantial burden on religion where the government's policy is justified by a compelling governmental interest. RFRA thereby creates a statutory cause of action for a plaintiff whose free exercise of religion is substantially burdened by application of a law or policy that is religion-neutral on its face. *See id.* §2000bb(b)(2).

In analyzing a claim under RFRA, we look first at whether a substantial burden has been imposed on the exercise of sincerely-held religious beliefs,[6] and then determine whether the state can justify the imposition of that burden. *See* 42 U.S.C. § 2000bb-1(a), (b). Thus, if the Goodalls cannot show that their exercise of religion is *substantially burdened* by the County's policy, the County is not required to come forth with proof of its interest. *See Werner v. McCotter*, 49 F.3d 1476, 1480 (10th Cir. 1995) (finding that under RFRA, only governmental regulation that places a substantial burden on a plaintiff's religious activity must be justified by a compelling state interest), *petition for cert. filed* (May 5, 1995). Since RFRA does not purport to create a new substantial burden test, we may look to pre-RFRA cases in order to assess the burden on the plaintiffs for their RFRA claim.

It is well established that there is no substantial burden placed on an individual's free exercise of religion where a law or policy merely "operates so as to make the practice of [the individual's] religious beliefs more expensive." *Braunfeld v. Brown*, 366 U.S. 599, 605 (1961) (plurality opinion). In *Braunfeld*, members of the Orthodox Jewish faith challenged a law in Pennsylvania which prohibited the

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6 The parties agree that the Goodalls send Matthew to a Christian school pursuant to their sincerely-held religious beliefs.

retail sale of certain items on Sundays. The plaintiffs were merchants who, before the law was enacted, had kept their businesses open on Sundays and were thereby able to compensate for losses that they incurred because their religion forbade them from opening their stores on Saturdays. They challenged the Sunday closing law, alleging that observance of the law would cause them severe economic hardship that might force them to give up their Saturday observances. The Supreme Court found that enforcement of the law did not burden the plaintiffs' free exercise of religion even thought it might cause them to lose money that they would earn if they were permitted to open their stores on Sundays. *See id.* at 606-07.

The Supreme Court has also repeatedly held that the fact that a person has a constitutional right (or, in the instant case, an analogous statutory right) does not necessarily impose upon the government an obligation to subsidize that right. *See Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 546 (1983) ("We again reject the 'notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State.'" (quoting *Cammarano v. United States*, 358 U.S. 498, 515 (1959), Douglas, J., concurring)); *Rust v. Sullivan*, 500 U.S. 173, 193 (1991) (finding that a right is not infringed simply because the government chooses not to fund it); *Harris v. McRae*, 448 U.S. 297, 317-18 (1980) (stating, in the context of a due process claim, that although a person may be conferred a freedom by the Constitution, there is no "entitlement to such funds as may be necessary to realize all the advantages of that freedom"); *see also Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. V. City of Lakewood, Ohio*, 699 F.2d 303, 306 (6th Cir.) ("Inconvenient economic burdens on religious freedom do not rise to a constitutionally impermissible infringement on free exercise."), *cert. denied*, 464 U.S. 815 (1983); *McCarthy v. Hornbeck*, 590 F. Supp.

936, 945 (D.Md. 1984) ("In essence, plaintiffs are here seeking a state subsidization of a part of the cost of sending their children to private, church-related schools. The Supreme Court has consistently held that a statute does not impinge on a constitutional right merely because it does not subsidize that right.").

Stafford County does not contest the Goodalls' decision to place Matthew in a religious school, nor does the County attempt to argue that Matthew should not receive the necessary cued speech services. The only burden claimed by the Goodalls is a financial one, and the sole question at issue is whether the County is constitutionally or statutorily required to provide the cued speech services at Matthew's Christian school, relieving the Goodalls of their financial burden.[7] Under the instant circumstances, we find that the economic burden borne by the Goodalls does not substantially impinge on their free exercise rights under RFRA.

The unemployment compensation cases cited by the Goodalls as the proper standard to use in assessing the burden on their free exercise rights do not dictate a contrary result. *See Frazee v. Illinois Dep't of Employment Sec.*, 489 U.S. 829 (1989); *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136 (1987); *Thomas v. Review Bd. of the Ind. Employment Sec. Div.*, 450 U.S. 707 (1981); *Sherbert*, 374 U.S. 398. In *Hobbie*, the Supreme Court articulated the standard for assessing a plaintiff's burden in an unemployment benefits case:

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7 At trial, Matthew's mother also testified that an emotional strain was put on the family when she provided the interpreting services for Matthew. However that issue has been resolved, since Matthew has had a paid transliterator since ninth grade.

> Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.

Hobbie, 480 U.S. at 141 (quoting *Thomas*, 450 U.S. at 717-18) (emphasis omitted). The Goodalls contend that if they can show that the provision of a cued speech transliterator for Matthew is an "important benefit," see *Hobbie*, 480 U.S. at 141, the County must be required to show that it has a compelling interest in not providing the service. However, the Goodalls have neither been compelled to engage in conduct proscribed by their religious beliefs, nor have they been forced to abstain from any action which their religion mandates that they take. Rather, they must pay for a cued speech transliterator if they decide to keep Matthew in a sectarian school and forego the advantages offered by the public school system in Stafford County.

We find that the financial burden which the Goodalls must bear in order to provide Matthew with a cued speech interpreter at his private sectarian school does not constitute a substantial burden under RFRA. We thus hold that the Goodalls' claim under RFRA is without merit.

Similarly, the Goodalls cannot prevail on their claim under the Free Exercise Clause. In the proceedings below, the County was not required to present evidence to the district court concerning the details of its special education policy, but the Goodalls concede that Matthew would receive

the services of a cued speech transliterator free of charge if he attended the County's public schools. Whether the County's policy is generally applicable and is analyzed under the standard articulated by the Supreme Court in *Smith*, 494 U.S. 872, or is not generally applicable and is properly examined by assessing whether a substantial burden has been placed upon the Goodalls, *see supra*, we conclude that the Goodalls' claim under the Free Exercise Clause fails.

III.

The Goodalls also attempt to make a claim under the Establishment Clause of the First Amendment. However, while the Establishment Clause determines whether the County may provide certain services in sectarian schools, it does not mandate that the County provide such services. *See McCarthy*, 590 F. Supp. at 943. The Goodalls' Establishment Clause argument thus also fails.[8]

Finally, we note that in *Goodall I*, we held that the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1401-1491o[9], did not dictate that Stafford County must provide or pay for the services requested by the Goodalls in Matthew's Christian school. 930 F.2d at 369. That portion of our opinion was not overruled by *Zobrest*, 113 S. Ct. 2462, and cannot be challenged in the instant appeal.

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[8] We decline to address the arguments made by the Goodalls under the Privileges and Immunities Clause and the Equal Protection Clause, because those arguments were not raised before the district court and no exceptional circumstances have been cited by the Goodalls to explain the omission. *Babb v. Olney Paint Co.*, 764 F.2d 240, 244 (4th Cir. 1985).

[9] At the time *Goodall I* was decided, the statute was referred to as the Education of the Handicapped Act (EHA). *See Goodall I*, 930 F. 2d at 365.

IV.

We thus conclude that the Goodalls have failed to sustain their burden under RFRA or the Free Exercise Clause of establishing that Stafford County's refusal to provide Matthew with a cued speech transliterator in his private sectarian school constitutes a substantial burden on the Goodalls' exercise of religion. The district court's decision to grant judgment as a matter of law to the County was therefore proper.

The judgment is accordingly

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

MATTHEW B. GOODALL an infant
by his father and next friend ROBERT
B. GOODALL, et al.
Plaintiffs

Civil #93-1210-A

V.

STAFFORD COUNTYSCHOOL BOARD,
Defendant.

ORDER

For the reasons stated from the bench, which together with the attached Findings of Fact the court adopts as its findings of fact and conclusions of law, the court concludes that the plaintiffs have not borne their burden of showing that the refusal of the defendant to provide a cued special interpreter at the school where plaintiffs have enrolled Matthew B. Goodall constitutes a substantial burden on the free exercise of their religious beliefs. Accordingly, it is hereby

ORDERED that judgment as a matter of law, pursuant to F. R. Civ. P. 52(c), is entered in favor of the defendant, Stafford County School Board, against the plaintiffs, Matthew B. Goodall, an infant, Robert B. Goodall and Kathleen N. Goodall, and this action is dismissed.

Albert V. Bryan, Jr.
United States District Judge

Alexandria, Virginia March 29th, 1994

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

MATTHEW B. GOODALL an infant by his father and next friend ROBERT B. GOODALL, et al.,
Plaintiffs,

CIVIL #93-1210-A

V.

STAFFORD COUNTY SCHOOL BOARD,
Defendant.

FINDINGS OF FACT

1. Matthew Goodall ("Matthew") is seventeen years old and a resident of Stafford County, Virginia.

2. The plaintiffs, Robert B. Goodall and Kathleen N. Goodall ("the Goodalls"), are his parents and residents of Stafford County, Virginia.

3. The defendant, Stafford County School Board is charged with implementing in Stafford County the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1401, et seq.

4. The relevant facts are essentially unchanged from those which were stipulated by the plaintiffs and defendant in the due process administrative proceedings and the prior proceeding before this court and the United States Circuit Court of Appeals for the Fourth Circuit with respect to Matthew's sixth grade school year, and the court adopts the historical facts recited in the opinion of the Court of Appeals, 930 F.2d 363 (4th Cir. 1991).

5. Matthew Goodall has been identified by the defendant as a handicapped child for whom special education services are appropriate. He is profoundly deaf as a result of an attack of meningitis at age 3-1/2. He uses cued speech for receptive language.

6. A cued speech transliterator does not teach. In the classroom the transliterator is simply the "ears" of the hearing impaired child by repeating with cued speech what the teacher or anyone else in the presence of the hearing impaired child says. The transliterator does not determine the content of speech.

7. The defendant provides one-on-one, full time, fluent cued speech transliterators for all profoundly deaf children whose parents have chosen cued speech as the child's primary mode for receptive language and who attend Stafford County public schools.

8. Matthew was placed by his parents in private, Christian schools in the mid-1980's. Matthew is successfully mainstreamed full time with hearing students at Fredericksburg Christian School. To be successfully mainstreamed, he requires the special education and related service of a full time, fluent cued speech transliterator in his regular classroom.

9. The defendant agrees that a full time qualified cued speech transliterator for Matthew is the appropriate special education and related service for Matthew; and the defendant would furnish a transliterator for Matthew if he attended public school. The plaintiff asks for reimbursement of no service except that of a transliterator, although the individualized education plan (IEP) developed for Matthew provides for additional service and would be provided to

Matthew if he attended public school. The IEP offers Matthew a free appropriate public education.

10. The Goodalls hold a sincere, religious conviction that they are to provide their children with Christian education and that they are to do so at this time in Christian schools.

11. When the defendant refused to provide Matthew a cued speech transliterator at Fredericksburg Christian School for his sixth grade school year, the plaintiffs and defendants exhausted their administrative remedy through a due process hearing and review proceeding, They then litigated in this court and the United States Court of Appeals for the Fourth Circuit the issue: whether the defendant must provide Matthew an interpreter on the premises of his religious school.

12. For each succeeding school year the defendant continued to refuse to provide Matthew a cued speech interpreter at Fredericksburg Christian School. It did so pursuant to defendant's policy expressed in Plaintiffs' Exhibit 8 that it does not provide any services at private schools to eligible students who have been placed at those schools by their parents.

13. Following the Supreme Court's holding in Zobrest V. Catalina Foothills School District, ___ U.S. ___ (June 18, 1993, No. 92-94), the Goodalls requested that Matthew be evaluated for special education and related services for this eleventh grade school year, the 1993-1994 school year. He was evaluated. The defendant again has determined that he is a handicapped child for whom special education and related services are appropriate. An IEP meeting was conducted at which an IEP was prepared. The parties did not agree upon all of its provisions, and it was not

signed as agreed. However, as a result of subsequent discussions and correspondence the only issue remaining in dispute is whether the defendant must furnish Matthew a cued speech transliterator at Fredericksburg Christian School. Defendant again refused to provide this service at Fredericksburg Christian School.

14. Matthew Attends Fredericksburg Christian School, which is a private sectarian school, and was put there voluntarily by his parents.

Albert V. Bryan, Jr.
United States District Judge

Alexandria, Virginia
March 29th, 1994

United States Constitution

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Federal Statutes

Individuals With Disabilities Education Act, 20 U.S.C., §1401, et seq.

20 U.S.C., §1413 -State plans-Requisite Features

(a) Any State meeting the eligibility requirements set forth in section 1412 of this title and desiring to participate in the program under this subchapter shall submit to the Secretary, through its State educational agency, a State plan at such time, in such manner, and containing or accompanied by such information, as he deems necessary. Each such plan shall---

(4) set forth policies and procedures to assure---

(A) that, to the extent consistent with the number and location of handicapped children in the State who are enrolled in private elementary and secondary schools, provision is made for the participation of such children in the program assisted or carried out under this subchapter by providing for such children special education and related services;

20 U.S.C. §1415(E)(2)

(2) Any party aggrieved by the findings and decision made under subsection (b) of this section who does not have the right to an appeal under subsection (c) of this section, and any party aggrieved by the findings and decisions under subsection (c) of this section, shall have the right to bring a civil action with respect to the complaint represented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount of in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines as appropriate.

42 U.S.C. §§1983, Civil Rights Act

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress

42 U.S.C. Section 2000bb, et seq., Religious Freedom Restoration Act of 1993, An Act To Protect the Free Exercise of Religion

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION I. SHORT TITLE.

This Act may be cited as the "Religious Freedom Restoration Act of 1993."

SECTION 2. CONGRESSIONAL FINDINGS AND DECLARATION OF PURPOSES.

(a) Findings.--The Congress finds that--

(1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;

(2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;

(3) governments should not substantially burden religious exercise without compelling justification;

(4) in *Employment Division v. Smith*, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and

(5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.

(b) Purposes.--The purposes of this Act are--

(1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee

its application in all cases where free exercise of religion is substantially burdened; and

(2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

SECTION 3. FREE EXERCISE OF RELIGION PROTECTED.

(a) In General.--Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).

(b) Exception.--Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person--

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(c) Judicial Relief--A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

SECTION 4. ATTORNEY FEES.

(a) Judicial Proceedings.--Section 722 of the Revised Statutes (42 U.S.C. 1988) is amended by inserting

"the Religious Freedom Restoration Act of 1993," before "or title IV of the Civil Rights Act of 1964".

(b) Administrative Proceedings.--Section 504(b)(1)(c) of title 5, United States Code, is amended--

(1) by striking "and" at the end of clause Iii);

(2) by striking the semicolon at the end of clause (iii) and inserting", and"; and

(3) by inserting "(iv) the Religious Freedom Restoration Act of 1993:" after clause (iii).

SECTION 5. DEFINITIONS.

As used in this Act--

(1) the term "government" includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, a State, or a subdivision of a State;

(2) the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States;

(3) the term "exercise of religion" means the exercise of religion under the First Amendment of the Constitution.

SECTION 6. APPLICABILITY.

(a) In General.--This Act applies to all Federal and State law, and the implementation of that law, whether

statutory or otherwise, and whether adopted before or after the enactment of this Act.

(b) Rule of Construction.--Federal statutory law adopted after the date of the enactment of this Act is subject to this Act unless such law explicitly excludes such application by reference to this Act.

(c) Religious Belief Unaffected.--Nothing in this Act shall be construed to authorize any government to burden any religious belief.

SECTION 7. ESTABLISHMENT CLAUSE UNAFFECTED.

Nothing in this Act shall be construed to affect, interpret, or in any way address that portion of the First Amendment prohibiting laws respecting the establishment of religion (referred to in this section as the "Establishment Clause"). Granting government funding, benefits, or exemptions, does not include the denial of government funding , benefits, or exemptions.

Section-by Section Analysis, S 2824 Congressional Record-Senate, March 11, 1993

SECTION-BY-SECTION ANALYSIS

. . .

SEC. 7. This section makes it clear that the legislation does not alter the law for determining claims made under the Establishment Clause of the First Amendment. It also confirms that granting government funding, benefits or exemptions, to the extent permissible under the Establishment Clause, does not violate the Act; but the denial of such funding, benefits, or such exemptions, may constitute a

violation of the Act, as was the case under the Free Exercise Clause in *Sherbert v. Verner*.

Federal Regulations

34 CFR §76.1 et seq, Education Division General Administrative Regulations (EDGAR)

34 CFR §76.650 Private schools: purpose of §76.651-76.662

(a) Under some programs, the authorizing statute requires that a State and its subgrantees provide for participation by students enrolled in private schools. Sections 76.651-76.662 apply to those programs and provide rules for that participation. These sections do not affect the authority of the State or a subgrantee to enter into a contract with a private party.

. . .

34 CFR §76.651 Responsibility of a State and a subgrantee

(a)(1) A subgrantee shall provide students enrolled in private schools with a genuine opportunity for equitable participation in accordance with the requirements in Sec. 76.652-76.662 and in the authorizing statute and implementing regulations for a program.

(2) The subgrantee shall provide that opportunity to participate in a manner that is consistent with the number of eligible private school students and their needs.

(3) The subgrantee shall maintain continuing administrative direction and control over funds and property that benefit students enrolled in private schools.

. . .

34 CFR §76.653 Needs, numbers of students, and types of services

A subgrantee shall determine the following matters on a basis comparable to that used by the subgrantee in providing for participation of public school students:

(a) The needs of students enrolled in private schools.

(b) The number of those students who will participate in a project.

(c) The benefits that the subgrantee will provide under the program to those students.

(Authority: 20 U.S.C. 1221e-3(a)(1))

34 CFR §76.654 Benefits for private school students

(a) Comparable benefits. The program benefits that a subgrantee provides for students enrolled in private schools must be comparable in quality, scope, and opportunity for participation to the program benefits that the subgrantee provides for students enrolled in public schools.

(b) Same Benefits. If a subgrantee uses funds under a program for public school students in a particular attendance area, or grade or age level, the subgrantee shall insure equitable opportunities for participation by students enrolled in private schools who:

(1) Have the same needs as the public school students to be served; and

(2) Are in that group, attendance area, or age or grade level.

(c) Different benefits. If the needs of students enrolled in private school are different from the needs of students enrolled in public schools, a subgrantee shall provide program benefits for the private school students that are different from the benefits the subgrantee provides for the public school students.

(Authority: 20 U.S.C. 1221e-3(a)(1))

34 CFR §76.655 Level of expenditures for students enrolled in private schools

(a) Subject to paragraph (b) of this section, a subgrantee shall spend the same average amount of program funds on:

(1) A student enrolled in a private school who receives benefits under the program; and

(2) A student enrolled in a public school who receives benefits under the program.

(b) The subgrantee shall spend a different average amount on program benefits for students enrolled in private schools if the average cost of meeting the needs of those students is different from the average cost of meeting the needs of students enrolled in public schools.

(Authority: 20 U.S.C. 1221e-3(a)(1))

. . .

34 CFR §76.658 Funds not to benefit a private school

(a) A subgrantee may not use program funds to finance the existing level of instruction in a private school or to otherwise benefit the private school.

(b) The subgrantee shall use program funds meet the specific needs of students enrolled in private schools, rather than:

(1) The needs of a private school; or

(2) The general needs of the students enrolled in a private school.

(Authority 20 U.S.C. 1221e-3(a)(1))

34 CFR §76.659 Use of public school personnel

A subgrantee may use program funds to make public personnel available to other than public facilities:

(a) To the extent necessary to provide equitable program benefits designed for students enrolled in a private school; and

(b) If those benefits are not normally provided by the private school.

(Authority: 20 U.S.C. 1221e-3(a)(1))

Regulations promulgated under Education of the Handicapped Act as amended by the Education of All Handicapped Children Act now Individuals with Disabilities Education Act 34 CFR Sec. 300.400 et seq.

34 CFR §300.403, Placement of children by parents

(a) If a handicapped child has available a free appropriate public education and the parents choose to place the child in a private school or facility, the public agency is not required by this part to pay for the child's education at the private school or facility. However, the public agency shall

make services available to the child as provided under Regs. 300.450-300.460.

(b) Disagreements between a parent and a public agency regarding the availability of a program appropriate for the child, and the questions of financial responsibility , are subject to the due process procedures under Regs. 300-500-300.514 of Subpart E.

(20 U.S.C. 1412(2)(B); 1415)

34 CFR §300.450. Definition of "Private School Handicapped Children."

As used in this part, "private school handicapped children" means handicapped children enrolled in private schools or facilities other than handicapped children covered under Regs. 300.400-300.402.

(20 U.S.C. 1413(a)(4)(A))

34 CFR §300.452 Local Educational Agency Responsibility.

The State educational agency shall insure that ---

(a) To the extent consistent with their number and location in the State, provision is made for the participation of private school handicapped children in the program assisted or carried out under this part by providing them with special education and related services; and

(b) The other requirements in 34 CFR 76.651-76.663 of EDGAR are met.

(20 U.S.C. 1413(a)(4)(A))

34 CFR §300.452 Local Educational Agency Responsibility.

(a) Each local educational agency shall provide special education and related services designed to meet the needs of private school handicapped children residing in the jurisdiction of the agency.

(20 U.S.C. 1413(a)(4)(A); 1414(a)(6))

34 CFR §300.552 Placements

Each public agency shall insure that: . . . (c) unless a handicapped child's individualized education program requires some other arrangement, the child is educated in that school which he or she would attend if not handicapped; and...

Comment...The overriding rule in this section is that placement decisions must be made on an individual basis...

OTHER APPENDED MATERIALS

Excerpt of School Board Affidavit Plaintiff's Trial Exhibit 8

AFFIDAVIT IN OPPOSITION OF
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

COMMONWEALTH OF VIRGINIA)
) to-wit:
COUNTY OF STAFFORD)

This day personally appeared before me, a Notary Public in and for my state and city aforesaid, Andrea Bengier, who, after being duly sworn, deposes and states as follows:

1. That she is the Director of Special Programs for the Stafford County School Board.

. . .

4. That the Stafford County School Board does not provide any special education services at the private schools (secular or otherwise) to any eligible students who have been unilaterally placed by their parents in private schools.

And further Affiant saith not.

Andrea Bengier
Andrea Bengier

Sworn and subscribed to before me this 17th day of November, 1993.

Delores S. Ciuch
Notary Public

My commission expires: *March 31, 1997*

Plaintiff's January 5, 1994 Request for Admissions

COME NOW your Plaintiffs pursuant to Fed. R. Civ. P. 36 and serve upon the Defendant the following Request for Admissions to be answered in accordance therewith.

Admit:

1. The Defendant provides special education and related services to some handicapped children at locations other than Stafford County public school premises.

ANSWER:

ADMIT. However, Stafford affirmatively states that it only provides services to handicapped children at locations other than on Stafford County public school premises when those children are enrolled in Stafford County public schools.

Stafford's response to Goodall's January 5, 1994 Interrogatories

2. For each handicapped child to whom the Defendant provides or has provided special education and related services during the current and immediately preceding school year other than on the premises of a Stafford County public school state what service is provided, the location of the service, the cost to the Defendant to provide the service, the nature of the handicap for which the service is provided and, if not privileged, the name and address of the child for whom this service is provided.

ANSWER: The names and address of students to whom Stafford is providing special education services is confidential and cannot be provided.

During the 1993-94 school year, Stafford has served students on the premises other than those of a Stafford County public school. Of course, those services were provided only to students who are enrolled in Stafford County public schools. Stafford has provided educational

services to 14 students at their homes. The costs of these services to Stafford ranges from $51.18 to $10,941.00.

Stafford provides occupational therapy and physical therapy services to one student at her home. The costs of these services to Stafford is approximately $2,676.72.

Stafford has provided services to 10 students who were placed by Stafford in private day schools. The cost of these services (which were paid by Comprehensive Services Act funds) ranges from $4,500 to $12,500 for the school year.

Stafford has provided services to three students in private residential facilities. The approximate cost of those services (which were paid by Comprehensive Services Act funds) are $70,000, $85,000, and $150,000.

Four of Stafford's enrolled students are provided services at public residential facilities. Stafford is currently unable to determine the cost of these services to Stafford because the Commonwealth of Virginia provides these services directly.

One of Stafford's students is currently enrolled in a public day school which is not part of the Stafford County Public Schools. The approximate cost to Stafford to provide these services is $20,000.

Stafford provided educational services to 20 students at their homes during the 1992-93 school year. The number of students who were provided services at other places during the 1992-93 school year is unavailable to Stafford.

Excerpts from transcript of March 29, 1994 Trial

[PAGE 5] MR. GOODALL: . . . We are prepared to prove that cued speech interpretation is an important governmental benefit by producing the facts that show its impact on our son's education life.

. . .

THE COURT: I don't think that . . . the defendant disputes that.

. . . And I've read their proposed findings, and I don't think that is in issue.

MR. GOODALL: We're prepared to prove that we have put Matthew in a Christian school based on sincerely-held religious beliefs.

. . .

THE COURT: I am sure they don't. . . . And I don't think that the costs to you are probably in dispute, that is, the financial aspect of it.

. . .

[PAGE 6] THE COURT: I think the facts are proven. Whether that constitutes a substantial burden on your free exercise, it seems to me, given those facts, is a matter of law for the Court to decide.

[PAGE 10] MS. MEHFOUD: Good morning. My name is Kathleen Mehfoud, I represent Stafford County School Board in this matter.

I'd like to begin by advising the Court that you are correct, we do not dispute the bona fides of the sincerely-held religious beliefs of the Goodalls nor is there a dispute over Matthew's need for a transliterator (sic). It is in the IEP. That has been proposed by Stafford as being appropriate.

Nor is there any dispute on the costs for the transliterator that the Goodalls assert that they have paid at Fredericksburg Christian School.

[PAGE 16]DIRECT EXAMINATION

MR. GOODALL: Your Honor, I think the record does explain cued speech . . . he needs it full time for all presentations of verbal information.

Essentially all of his education comes through that, so this isn't a service that could be obtained part-time. It's not a service that could be obtained anywhere other than in his regular classroom as everything's going on.

Everything the teacher says, all of the [PAGE 17] classroom discussion with other students, any instruction, even at the last minute as the children are walking out the door, "Be sure to read the next chapter," all of that comes through the cued speech interpreter.

And so without it, he would be completely lost when we think he's [now] successfully mainstreamed.

. . . [T]here are other services . . . like speech therapy. That service we don't have to have at the child's regular school or his regular classroom or even during school hours for him to benefit from it. And [PAGE 18] that's what make[s] it different.

. . . And in fact the only [service] . . . that we're asking or that we've ever asked that they deliver at Fredericksburg Christian School is cued speech interpretation because . . . it's the only one that forces us to choose between getting the benefit and getting his education at Fredericksburg Christian School where we sincerely [believe] the Lord has told us to send the children.

Exerpt from the School Board's
Questions Presented from its brief
in opposition to the Goodalls' 1991 petition for writ of certiorari,Record No. 91-163

QUESTIONS PRESENTED

. . .

3. Would the School Board's violate the Establishment Clause of the First Amendment if it provided a publicly sponsored cued speech interpreter in a pervasively religious school?

4. Is the School Board's refusal to provide a publicly sponsored interpreter for Matthew in a pervasively religious school justified by a compelling state interest?

(2)

Supreme Court, U.S.
FILED
NOV 22 1995
CLERK

No. 95-666

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1995

MATTHEW B. GOODALL, An Infant, By His Father And Next Friend, Robert B. Goodall, and Robert B. Goodall and Kathleen N. Goodall,

Petitioners,

v.

STAFFORD COUNTY SCHOOL BOARD,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

Kathleen S. Mehfoud
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BEST AVAILABLE COPY

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QUESTIONS PRESENTED

1. Whether the Goodalls' case is barred by res judicata.

2. Whether requiring parents to pay the costs associated with the education of their son, voluntarily placed by them in a sectarian school, substantially burdens their free exercise of religion.

3. Whether a public school board can be compelled under the Establishment Clause to provide services at a sectarian school when those services are made available for free in its schools.

LIST OF PARTIES

Petitioner, Matthew B. Goodall, formerly an infant, brought suit by his father and next friend, Robert B. Goodall. Petitioners, Robert B. Goodall and Kathleen N. Goodall, are the parents of Matthew B. Goodall.

Stafford County School Board, the Respondent, operates the public school system in Stafford County, Virginia pursuant to the Constitution and Statutes of Virginia.

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No. 95-666

IN THE
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MATTHEW B. GOODALL, An Infant, By His Father And Next Friend, Robert B. Goodall, and Robert B. Goodall and Kathleen N. Goodall,

Petitioners,

v.

STAFFORD COUNTY SCHOOL BOARD,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, Stafford County School Board, respectfully requests that this Court deny the Petition for Writ of Certiorari submitted by the Petitioners in this case.

OPINIONS BELOW

The U.S. Court of Appeals for the Fourth Circuit, on July 27, 1995, ruled in favor of Stafford County School Board ("Stafford") and affirmed the District Court's grant of judgment as a matter of law pursuant to Federal Rule of Civil Procedure 52(c). Goodall v. Stafford County School Board ("Goodall II"), 60 F.3d 168 (4th Cir. 1995). The Court of Appeals found that the denial by Stafford of a cued speech interpreter at a private sectarian school did not constitute a substantial burden under the Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. §§ 2000bb to 2000bb-4 or under the Free Exercise Clause. The Court of Appeals also held that the Establishment Clause of the First Amendment to the Constitution of the United States did not mandate the provision of the interpreter's services at the private school and that any challenge under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§ 1400, et seq., was barred by its prior ruling in Goodall v. Stafford County School Board ("Goodall I"), 930 F.2d 363, 369 (4th Cir. 1991), cert. denied, 502 U.S. 864 (1991). The Court of Appeals' opinion is reproduced in the Appendix to the Petition for Writ of Certiorari. (App. 1-11).

The decision of the U.S. District Court for the Eastern District of Virginia, Alexandria Division, entered on March 29, 1994, granting judgment in favor of Stafford County School Board is set forth in the Appendix to the Petition for Writ of Certiorari. (App. 12-16).

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

There are no additions to the constitutional and statutory provisions cited by the Petitioners.

STATEMENT OF THE CASE

Stafford County School Board ("Stafford") operates the public school system in Stafford County, Virginia. Matthew Goodall is a resident of Stafford County, Virginia, but, at the choice of his parents, attended Fredericksburg Christian School, a private sectarian school. Fredericksburg Christian School is located in the City of Fredericksburg, Virginia, and not in Stafford County.

Matthew Goodall has been profoundly deaf since the age of three and was identified by Stafford as a student with disabilities. In 1993, at the request of the Goodalls, Stafford developed an individualized education plan ("IEP") for Matthew. The IEP would have enabled him to receive a free appropriate public education in the public schools. The appropriateness of the IEP was conceded by the Goodalls.

The IEP specified that Matthew would have an interpreter for his classes, would receive speech and

language services and would receive mathematics instruction in a learning disabilities class. The Goodalls declined all services but the interpreter and requested that the interpreter serve Matthew at the Christian school.

An interpreter is capable of serving more than one disabled student at a time. Interpreters are not provided on a one-on-one basis unless there would be no other deaf student in the same class or activity. There could have been an opportunity for Matthew to share an interpreter with another student for some activities and classes. The incidence of deaf students is rare and pooling of educational resources in a single program addresses administrative and cost concerns.

Stafford took no action to prevent Matthew from attending the sectarian school. Matthew attended the Christian school chosen by his parents and graduated in June 1995. In dispute are the costs of the interpreter services provided since January 1992 by the Goodalls, at an approximate cost of $14,000 annually.

It is the practice of the Stafford County School Board to serve students with disabilities in its established public school programs if a free appropriate public education is available within those programs. As noted, the Goodalls admit that there was an appropriate program available to Matthew in the public schools. Only if a free appropriate public education is not available within the Stafford County Public Schools, would Stafford place a student in a private school or in another public school so that appropriate services would be provided.

This policy is generally applied to all students. Religion is not a determining factor for these placement decisions. The religious beliefs of the Goodalls played no part in Stafford's decision that Matthew could be appropriately served in the public school or in the denial of an interpreter at the Christian school. The Fourth Circuit held that this policy was neutral in application and did not impose a substantial burden on the Goodalls.

This case has a lengthy procedural history. In 1988, the Goodalls first challenged Stafford's refusal to pay for a cued speech interpreter for Matthew at Fredericksburg Christian School. In their suit, the Goodalls alleged that they were entitled to this payment pursuant to the requirements of the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400, et seq. The Goodalls also alleged that the Establishment Clause of the First Amendment to the Constitution of the United States did not prohibit the provision of the interpreter at the Christian school site. The Goodalls' Petition to this Court erroneously portrays this earlier case as being decided solely on the issue of the Establishment Clause. The Fourth Circuit ruled against the Goodalls on both grounds, and this Court denied the subsequent Petition for Writ of Certiorari. See Goodall I, supra.

Subsequent to the Fourth Circuit's ruling, this Court held in Zobrest v. Catalina Foothills School District, ___ U.S. ___, 113 S. Ct. 2462 (1993), that the Establishment Clause did not bar the provision of a cued speech interpreter at a sectarian school. The ruling, however, left undisturbed the Fourth Circuit's decision in Goodall I that the provision of the interpreter's services at

the sectarian school was not required under IDEA. Relitigation of this IDEA issue is foreclosed by the decision in Goodall I.

The Goodalls filed this second suit in U.S. District Court for the Eastern District of Virginia, Alexandria Division, on September 23, 1993, and again sought payment for an interpreter. The Goodalls alleged, in this latest proceeding, that the refusal to provide the cued speech interpreter imposed a substantial burden on their free exercise of religion and violated RFRA. The Goodalls' claim under RFRA was made in an amended pleading. Consideration of this particular amendment was objected to by Stafford because the amendment had not been authorized by the District Court. The District Court, however, heard the claim and granted judgment as a matter of law at the close of the Goodalls' case under Fed. R. Civ. P. 52(c). The District Court determined that the Goodalls had not established the existence of a substantial burden on their free exercise of religion.

The Court of Appeals for the Fourth Circuit affirmed the District Court's judgment and found additional reasons to deny relief to the Goodalls. The Court of Appeals held that its prior ruling in Goodall I finding that the interpreter was not required under IDEA could not be relitigated. The Court of Appeals also held that there was no substantial burden on the Goodalls' free exercise of religion and thus no violation of any right granted by the First Amendment to the Constitution of the United States or by RFRA. The Court of Appeals also found that the Establishment Clause did not mandate that Stafford provide services at the sectarian school.

ARGUMENT

A. THE GOODALLS' CASE IS BARRED BY RES JUDICATA.

Stafford has offered a free appropriate public education for Matthew in the public schools. This fact is conceded by the Goodalls. The parents, however, have elected to reject that program and have chosen to place Matthew in a private religious school. It has previously been conclusively and finally held that Stafford was in full compliance with the requirements of IDEA when it offered Matthew an appropriate program in the public school.

Nonetheless, the Goodalls' argue throughout their Petition that there is an obligation arising under IDEA which compels the provision of the requested services. Petition for Writ of Certiorari, pp. 11, 14-15. This argument is without merit and is contrary to the prior final decision in this case.

In Goodall I, the Fourth Circuit held:

> In short, by offering Matthew the services of a cued speech interpreter at [the public school], the County is in full compliance with the requirements of the [IDEA] and the regulations promulgated thereunder. If the County's offer of services in a public school is "meaningless" to Matthew as his parents claim, it is because of the parents' decisions and conditions for Matthew's education, not by the operation of any state or federal law.

Id. at 369.

Under the law of this case, the IDEA does not require that the IEP services which have been offered for free in the public school be duplicated for Matthew at the Christian school. The Court of Appeals noted in Goodall II that this portion of Goodall I was not overruled by Zobrest and was not capable of being challenged in the instant appeal. Goodall II, at 173; see also, Christianson v. Colt Industries, 486 U.S. 800, 830 (1988). The issue of entitlement to the interpreter under IDEA cannot be relitigated in this case under the principles of res judicata. Parklane Hosiery Company v. Shore, 439 U.S. 322, 326 (1979). Commissioner v. Sunnen, 333 U.S. 591, 597 (1948). This issue does not warrant review by this Court.

B. REQUIRING PARENTS TO PAY THE COSTS ASSOCIATED WITH THE EDUCATION OF THEIR SON, VOLUNTARILY PLACED BY THEM IN A SECTARIAN SCHOOL, DOES NOT SUBSTANTIALLY BURDEN THEIR FREE EXERCISE OF RELIGION.

The Court of Appeals correctly held that there was no substantial burden on the Goodalls' free exercise of religion under RFRA or under the Free Exercise Clause. Both legal challenges require proof of the existence of a substantial burden. No substantial burden is created by the failure of the Goodalls to accept the offer of free services made by Stafford.

In order to establish a violation of RFRA, it was necessary for the Goodalls to prove a substantial burden on

their free exercise of religion. 42 U.S.C. § 2000bb-1(a). Even if there were a substantial burden, the burden would be permissible if justified by a compelling government interest. 42 U.S.C. § 2000bb(b). The Goodalls failed even to establish the existence of a substantial burden thereby obviating the need for Stafford to show a compelling government interest in this circumstance.

The Court of Appeals correctly found that there was no substantial burden under RFRA. In reaching this conclusion, the Court of Appeals applied existing case law to determine if a substantial burden existed. The Court of Appeals held that RFRA had not modified the standard by which the existence of a substantial burden would be determined. Goodall II, at 171. This analysis by the Court of Appeals is consistent with decisions of other circuits. See, Abdur-Rahman v. Michigan Department of Corrections, 65 F.3d 489, 492 (6th Cir. 1995); Bryant v. Gomez, 46 F.3d 948, 949 (9th Cir. 1995); Werner v. McCotter, et al., 49 F.3d 1476, 1480 (10th Cir. 1995). The stated intent of RFRA as set forth in the Act was ". . . to restore the compelling interest test . . . and to guarantee its application in all cases where free exercise of religion is substantially burdened." (App. 19-20). No modification to the substantial burden test was included. Thus, the Court of Appeals was correct in holding that RFRA did not affect prior law construing whether a substantial burden had been imposed.

No substantial burden was established by the Goodalls. The Goodalls have refused the free services offered by Stafford and have voluntarily assumed the costs of the private school. Their refusal of the free services

does not constitute a substantial burden. Citing prior decisions of this Court, the Court of Appeals correctly held that a policy which makes the exercise of religious beliefs more expensive while still allowing the individual to pursue their religious beliefs, imposes no substantial burden. Braunfeld v. Brown, 366 U.S. 599, 605 (1961); Regan v. Taxation Without Representation of Washington, 461 U.S. 540, 546 (1983); Rust v. Sullivan, 500 U.S. 173, 193 (1991); and Harris v. McRae, 448 U.S. 297, 317-18 (1980). See also, Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood, Ohio, 699 F.2d 303, 306 (6th Cir. 1983), cert. denied, 464 U.S. 815 (1983); McCarthy v. Hornbeck, 590 F. Supp. 936, 945 (D. Md. 1984). As these cases demonstrate, the Goodalls simply have no affirmative statutory entitlement to have their religious beliefs subsidized by state or federal funds.

The fact that the exercise of religious beliefs may have been made more expensive by the refusal to provide an interpreter does not impose a substantial burden. In the instant case, the only issue is who is going to pay for the interpreter's services. Contradictorily, the Goodalls were willing to pay all other costs of Matthew's education at the sectarian school, including tuition and transportation costs. They do not allege that the payment of those expenses burden their free exercise of religion. It is the additional cost of the interpreter which they allege causes the burden.

The Goodalls have pursued the exercise of their religious beliefs free from any government compulsion. Matthew attended and graduated from the religious school of their choice. Although the pursuit of the Goodalls'

religious beliefs may have been made more costly, this fact does not arise to a substantial burden.

It is for this same reason that the unemployment compensation cases cited by the Goodalls are inapposite. See Frazee v. Illinois Dept. of Employment Section, 489 U.S. 829 (1989); Hobbie v. Unemployment Appeals Commission of Florida, 480 U.S. 136 (1987). Thomas v. Review Board of the Indiana Employment Section Division, 450 U.S. 707 (1981); Sherbert v. Verner, 374 U.S. 398 (1963). The Court of Appeals appropriately determined that these cases were not applicable to the Goodalls' situation because the Goodalls had "neither been compelled to engage in conduct prescribed by their religious beliefs, nor have they been forced to abstain from any action which their religion mandates that they take. Rather, they must pay for a[n interpreter] if they decide to keep Matthew in a sectarian school and forego the advantages offered by the public school system in Stafford County." Goodall II, at 172-3. Thus, no substantial burden existed under RFRA.

Nor does a substantial burden exist under constitutional law. The Fourth Circuit correctly held that the policy of offering services at the public school when appropriate did not violate the Free Exercise Clause regardless of how it was analyzed. A neutral policy of general applicability does not offend the Free Exercise Clause even if there is an incidental effect on religious practice. Employment Division, Dept. of Human Resources of Or. V. Smith, 494 U.S. 872, 878-79; American Life League, Inc. v. Reno, 47 F.3d 645, 654 (4th Cir. 1995), cert. denied, ____ U.S. ____, (1995). As

noted earlier, the Court of Appeals found that the policy did not impose a substantial burden on the Goodalls' free exercise of religion. Thus, the Fourth Circuit correctly held that there was no violation of the Free Exercise Clause in this case whether judged by the substantial burden test or by the neutrality test.

Matthew's situation is not different from that of any student whose parents have chosen to place him in a private school, whether sectarian or non-sectarian. Basically, the Goodalls argue that, because an education is available free in the public schools, there is a burden on their free exercise of religion if the parents must pay for those same services at a private school. If this argument is accepted, school boards would have to pay tuition for all students who attend sectarian schools because of their religious beliefs even though there is a free appropriate public education available to them in the public schools. This result is not required under the Free Exercise Clause.

C. A PUBLIC SCHOOL BOARD CANNOT BE COMPELLED UNDER THE ESTABLISHMENT CLAUSE TO PROVIDE SERVICES AT A SECTARIAN SCHOOL WHEN THOSE SERVICES ARE MADE AVAILABLE FOR FREE IN ITS SCHOOLS.

The Goodalls seek through the Establishment Clause to require Stafford to modify its policy so that Matthew's education at the sectarian school would be subsidized. The Court of Appeals correctly held that the Establishment Clause determines whether services may be provided at the sectarian school. The Establishment

Clause, however, cannot be utilized to mandate the provision of those services. Goodall II, at 173; see also, Bowen v. Roy, 476 U.S. 693, 699-700 (1986). This result has not been changed by Rosenburger v. University of Virginia, ___ U.S. ___ (1995) ("A central lesson of our decisions is that a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion."). Thus, the Goodalls' Establishment Clause claim was appropriately denied.

CONCLUSION

For the reasons stated above, the Stafford County School Board respectfully requests that the Petition for Writ of Certiorari be denied.

STAFFORD COUNTY SCHOOL BOARD

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